

No. 15229

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United States  
Court of Appeals  
for the Ninth Circuit

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STEPHEN G. ACHONG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Petition to Review a Decision of The Tax Court  
of the United States

FILED

JAN 18 1957

PAUL P. O'BRIEN, CLERK



No. 15229

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Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 33319

STEPHEN G. ACHONG, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

APPEARANCES

For Petitioner:

Samuel P. King, Esq.

E. R. Cameron, Esq.

Herbert C. Dunn, Esq.

For Respondent:

E. A. Tonjes, Esq.

DOCKET ENTRIES

1951

Apr. 2—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 3—Copy of petition served on General Counsel.

Apr. 2—Request for Circuit hearing in Honolulu, filed by taxpayer. 4/13/51—Granted.

May 14—Answer filed by General Counsel.

May 17—Copy of answer served on taxpayer, Honolulu, T. H.

1954

May 7—Hearing set July 9, 1954, Honolulu, T. H.

May 24—Notice changing hearing date to July 15, 1954, Honolulu, T. H.

1954

July 22—Hearing had before Judge LeMire on the merits; Appearance of Herbert C. Dunn, filed. Stipulation of Facts filed; Petitioner's Brief due Sept. 22, 1954; Respondent's Brief due Nov. 8, 1954; Petitioner's Reply Brief due Dec. 8, 1954.

Aug. 30—Transcript of Hearing 7/15/54 and 7/22/54 filed.

Sept. 23—Motion for extension to Oct. 22, 1954, to file brief filed by Petitioner. Granted.

Oct. 25—Brief filed by taxpayer. Copy served.

Dec. 8—Brief filed by General Counsel.

1955

Jan. 14—Motion for extension to Jan. 14, 1955, to file the attached reply brief, brief lodged, filed by taxpayer. 1/17/55—Granted.

Jan. 18—Copy of motion and reply brief served on General Counsel.

1956

Mar. 26—Memorandum findings of fact and Opinion filed, Judge LeMire. Decision will be entered for the Respondent. 3/27/56 Copy served.

Mar. 27—Decision entered, Judge LeMire, Div. 5.

June 26—Bond in the amount of \$24,000.00, approved and filed.

June 26—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with assignments of error filed by Petitioner.

1956

June 26—Notice of filing petition for review, with proof of service thereon, filed.

June 26—Designation of contents of record on appeal and Praecipe for Record, with proof of service thereon, filed.

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[Title of Tax Court and Cause.]

### PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols IT : FC : LMJ : 150D) dated March 14, 1951, and as a basis of his proceeding alleges as follows:

#### I.

The petitioner is an individual, a citizen of the United States, and a resident of the City and County of Honolulu, Territory of Hawaii. His home address is 45-503 Kamehameha Highway, Kaneohe, Hawaii. The income tax returns for the years here involved were filed with the Collector of Internal Revenue, District of Hawaii, at Honolulu, Hawaii.

#### II.

The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on March 14, 1951.

## III.

The deficiencies as determined by the Commissioner of Internal Revenue are in income taxes for the calendar years 1946 and 1947 in the amounts of \$10,799.76 and \$1,105.69, respectively, a total of \$11,905.45, of which \$11,721.41 is in dispute.

## IV.

The determinations of the taxes set forth in the said notice of deficiency are based upon the following errors:

A. The Commissioner of Internal Revenue has erred in determining that the petitioner's homestead, a substantial portion of which was sold during the calendar years 1946 and 1947, had been held by him primarily for sale to customers in the ordinary course of his trade or business, and in failing to determine, instead, that the said land was a capital asset.

B. The Commissioner of Internal Revenue has erred in determining that the gains realized by the petitioner from sales of a substantial portion of his homestead during the calendar years 1946 and 1947 were ordinary income, and in failing to determine, instead, that the said gains were long-term capital gains.

C. The Commissioner of Internal Revenue has erred in determining that there are deficiencies of \$10,799.76 and \$1,105.69, respectively, in the petitioner's returns of income taxes for the calendar years 1946 and 1947, and in failing to determine, instead, that there is a deficiency of \$184.04 in the

petitioner's return of income tax for the calendar year 1946 and that petitioner's original return of income tax for the calendar year 1947 was correct.

#### V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. The petitioner is a citizen of the United States, is unmarried, and resides at 45-503 Kamehameha Highway, City and County of Honolulu, Territory of Hawaii. Throughout the calendar years 1946 and 1947, petitioner was employed full time by Metropolitan Market No. 1, City of Honolulu, as a cashier. He had no office or place of business of his own.

B. Petitioner duly filed with the Collector of Internal Revenue, District of Hawaii, Honolulu, Hawaii, his individual income tax return for the calendar year 1946. The said return disclosed an adjusted gross income of \$23,577.94 in the determination of which there was taken into account 50 per centum, viz., \$17,271.40, of a long-term capital gain of \$34,542.80, which he determined originally he had realized from sales of real property. The petitioner elected the standard deduction. Upon a net income of \$23,077.94, his income tax liability was \$8,284.93, which he duly paid to the Collector aforesaid.

C. The petitioner duly filed with the Collector aforesaid his individual income tax return for the calendar year 1947. The said return disclosed an adjusted gross income of \$9,201.04 in the determina-

tion of which there was taken into account 50 per centum, viz., \$3,252.20, of a long-term capital gain of \$6,504.39, which was realized from sales of real property. The petitioner elected the standard deduction. Upon a net income of \$8,701.04, his income tax liability was \$1,926.93, which he duly paid to the Collector aforesaid.

D. Pursuant to the provisions of the Revised Laws of Hawaii, 1915, governing the transfer of land for homestead purposes, the Petitioner purchased from the Territory of Hawaii, in consideration of \$750.00 and for use as a homestead, 11.6 acres of land included in the Halekou-Waikalua-kai Homesteads, District of Koolaupoko, County of Honolulu, and otherwise designated 45-503 Kamehameha Highway, Kaneohe, Oahu, Territory of Hawaii.

E. Petitioner immediately erected a dwelling upon the homestead land aforesaid and has occupied the said dwelling continuously as his home, since 1923.

F. Immediately after acquiring the homestead land aforesaid, and continuously thereafter until employment conditions which arose out of the prosecution of World War II, caused him to discontinue farming, the petitioner farmed his homestead land as an enterprise for profit. Subsequently to terminating his farm operations, and until its subdivision in 1946, petitioner rented the arable portion of his homestead lands for farming.

G. During 1946, Samuel W. King, a realtor and dealer in real estate, asked the petitioner if he

would sell the portion of the homestead land which the petitioner was not occupying for residential purposes and which was rented. The said dealer pointed to the meager returns which petitioner was receiving as rent. Petitioner granted to Samuel W. King, aforesaid, an option either to purchase en bloc or to subdivide and sell the homestead land aforesaid, reserving, however, the first 300 feet of the property fronting on Kamehameha Highway, which reservation included the petitioner's dwelling. If realtor King elected to subdivide and sell the parcel of land aforesaid it was provided that he should secure the approval of any governmental agencies having jurisdiction over the contemplated sale; that he should hire and supervise surveyors and contractors as needed for preliminary planning and for putting the property in condition for sale in accordance with any approved plan of subdivision; that he should prepare all necessary documents, contracts, deeds, and other instruments in connection therewith; that he should pay as his own all costs of promotion, advertising, and all other costs necessary for the actual sale of the property; that he should prepare the necessary documents attendant upon all sales, make collections and receive payments on account of all sales, and act as escrow agent for the delivery of papers in connection with all sales; and that he should keep complete records and books of account pertaining to the contemplated project; et cetera. Only the costs of subdivision were to be borne by the petitioner.

H. Realtor Samuel W. King elected the second

alternative and contracted to subdivide, pursuant to the Revised Ordinances of Honolulu, 1942, the 11.6 acres of land which comprised the petitioner's homestead. King caused the land to be surveyed, mapped, and platted for subdivision into thirty-three (33) lots, three (3) of which comprised the homesite land that was reserved by the petitioner. Realtor King filed, on August 1, 1946, with the City Planning Commission, City and County of Honolulu, an application for the subdivision of the petitioner's homestead. The application was approved on the date it was filed.

I. The Revised Ordinances of Honolulu, 1942, provided that a subdivider of rural land need install only necessary streets and water mains, including fire hydrants. Sewers, sidewalks, and electric and gas utilities were not required.

J. During the months of August, September, October and November, 1946, Realtor King, without advertising of any kind or sort, without erecting signs upon the property, and before construction of roads, water mains and fire hydrants, received and accepted offers from persons who lived in the neighborhood of the proposed subdivision, to purchase, subject to the installation of water mains and the construction of a road, all thirty (30) lots which he had been authorized to sell. The petitioner gave none of his time or attention to negotiating the said sales.

K. Samuel W. King, on October 26, 1946, entered into a contract with Paul Low Engineering & Construction Company for the installation of a



water main, fire hydrants, and a blind road connecting with Kamehameha Highway and bisecting the rectangular parcel of homestead land. The construction work was completed and accepted early in 1947.

L. Petitioner elected, in his individual income tax returns for the calendar years 1946 and 1947, to return on the installment basis the gains realized from sales of his homestead land.

M. The corrected long-term capital gain realized by the petitioner during the calendar year 1946 from sales of his homestead land was \$35,199.48, only 50 per centum of which should be taken into account in computing his net income for the calendar year 1946. The long-term capital gains realized by petitioner during the calendar year 1947 from the same source was \$6,504.39, only 50 per centum of which should be taken into account in computing his net income for the calendar year 1947.

N. Petitioner acquired the homestead in 1923 as a homesite and for investment. The homestead land which was sold as aforesaid was not property held by the petitioner primarily for sale to customers in the ordinary course of his trade or business.

O. Throughout the calendar years 1946 and 1947, the petitioner gave his full time serving as cashier of Metropolitan Market No. 1 within the city limits of Honolulu. He was not a dealer in real property at any time during the calendar years aforesaid; he had no private office or place of business.

P. Neither before 1946 nor after 1947, has the petitioner held real property for sale, nor has he sold real property, excepting the homestead land aforesaid.

Q. The homestead land which the petitioner acquired in 1923 and which he sold in part during 1946 and 1947 was a capital asset as defined in section 117(a)(1), I.R.C., and the gains realized during the calendar years 1946 and 1947 from its sale were long-term capital gains only 50 per centum of which should be taken into account in computing the petitioner's net capital gain for each of the taxable years stated.

R. The Commissioner has determined that the homestead land which was acquired and sold as aforesaid was property held by the petitioner for sale to customers in the ordinary course of petitioner's trade or business, and has included in the petitioner's gross and net incomes for the calendar years 1946 and 1947, respectively, 100 per centum of the gains realized during each of the said years from sales of said realty.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that the homestead land which the petitioner sold during 1946 was a capital asset; that the gains realized during the calendar years 1946 and 1947 from sales of the said land were long-term capital gains; that only 50 per centum of the said gains should be taken into account in determining petitioner's net capital gains and net incomes for the taxable years

aforsaid; that there is a deficiency of \$184.04 in petitioner's return of income tax for the calendar year 1946; but that there is no deficiency in petitioner's return of income tax for the calendar year 1947.

/s/ SAMUEL P. KING,

/s/ E. R. CAMERON,

Counsel for Petitioner

Duly Verified.

EXHIBIT A

Form 1230

SN-IT-1

Treasury Department, Internal Revenue Service,  
P. O. Box 421, Honolulu 9, Hawaii

Office of Internal Revenue Agent in Charge, Honolulu Division, 560 Alexander Young Building.

In reply refer to IT:FC:LMJ:150D

Mr. Stephen G. Achong,  
45-503 Kamehameha Highway,  
Kaneohe, Oahu, T. H.

March 14, 1951

Dear Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1946, and December 31, 1947, discloses a deficiency of \$11,905.45, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 150 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia

as the 150th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, P. O. Box 421, Honolulu 9, T. H., for the attention of IT:FC:LMJ. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,  
Commissioner

/s/ By H. A. PETERSON,  
Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Form of waiver.

#### Statement

Mr. Stephen G. Achong, 45-503 Kamehameha Highway, Kaneohe, Oahu, T. H.

Year	Deficiency
1946 .....	\$ 10,799.76
1947 .....	1,105.69
	<hr/>
Total .....	\$ 11,905.56

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 29, 1950, to your protest dated December 8, 1950, and to the statements made at the conference held on February 27, 1951.

A copy of this letter and statement has been mailed to your representative, Mr. S. A. Goff, c/o Cameron, Tennent & Greaney, P. O. Box 3556, Honolulu 11, T. H., in accordance with the authority contained in the power of attorney executed by you.

### Taxable Year Ended December 31, 1946

#### Adjustments to Net Income

Net income as disclosed by original return.....	\$ 23,077.94
Unallowable deductions and additional income:	
(a) Gain from sale of lots .....	35,199.48
	<hr/>
Total .....	\$ 58,277.42
Nontaxable income and additional deductions:	
(b) Net long-term capital gains .....	17,271.40
	<hr/>
Net income adjusted.....	\$ 41,006.02

#### Explanation of Adjustments

(a) In your income tax return for the calendar year 1946 you have reported gain of \$34,542.80 from the sale of lots which you treated as long-term capital gain for income tax purposes and took into net income to the extent of 50% thereof, or \$17,271.40.

It is held that the correct amount of gain realized on the sale of the lots was \$35,199.48. It is further held that the lots sold were at the time of

sale held for sale to customers in the ordinary course of a trade or business within the meaning of section 117(a)(1)(A) of the Internal Revenue Code, and that the gain is taxable as ordinary income, and not as capital gain.

(b) Gain from sale of lots improperly reported as net long-term capital gain is eliminated.

### Computation of Tax

Net income adjusted.....	\$ 41,006.02
Less: Exemption .....	500.00
	<hr/>
Balance subject to tentative normal tax and surtax.....	\$ 40,506.02
	<hr/>
Tentative normal tax and surtax on \$40,506.02.....	\$ 20,089.15
Less: 5% of \$20,089.15 .....	1,004.46
	<hr/>
Correct income tax liability.....	\$ 19,084.69
Income tax liability disclosed by original return:	
Account No. 300386 .....	8,284.93
	<hr/>
Deficiency in income tax.....	\$ 10,799.76

### Taxable Year Ended December 31, 1947

#### Adjustments to Net Income

Net income as disclosed by return.....	\$ 8,701.04
Unallowable deductions and additional income:	
(a) Gain from sale of lots.....	6,504.39
	<hr/>
Total .....	\$ 15,205.43
Nontaxable income and additional deductions:	
(b) Net long-term capital gains .....	3,252.20
	<hr/>
Net income adjusted .....	\$ 11,953.23

#### Explanation of Adjustments

(a) In your income tax return for the calendar year 1947 you have reported gain of \$6,504.39 from the sale of lots which you treated as long-term

capital gain for income tax purposes and took into net income to the extent of 50% thereof, or \$3,-252.20. It is held that the lots sold were at the time of sale held for sale to customers in the ordinary course of a trade or business within the meaning of section 117(a)(1)(A) of the Internal Revenue Code, and that the gain is taxable as ordinary income, and not as capital gain.

(b) Gain from sale of lots improperly reported as net long-term capital gain is eliminated.

Computation of Tax

Net income adjusted .....	\$ 11,953.23
Less: Exemption .....	500.00
	<hr/>
Balance subject to tentative normal tax and surtax.....	\$ 11,453.23
	<hr/>
Tentative normal tax and surtax on \$11,453.23.....	\$ 3,192.23
Less: 5% of \$3,192.23 .....	159.61
	<hr/>
Correct income tax liability.....	\$ 3,032.62
Income tax liability disclosed by return, Account No. 300330 .....	1,926.93
	<hr/>
Deficiency in income tax.....	\$ 1,105.69

[Endorsed]: T.C.U.S. Filed April 2, 1951.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed

by the above petitioner, admits and denies as follows:

I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the deficiencies as determined by the Commissioner of Internal Revenue are income taxes for the calendar years 1946 and 1947 in the amounts of \$10,799.76 and \$1,105.69, respectively, a total of \$11,905.45; denies for lack of information the remaining allegations contained in paragraph III of the petition.

IV.

A to C, inclusive. Denies the allegations of error contained in paragraph IV, A to C, inclusive, of the petition.

V.

A. Admits the allegations contained in the first sentence of paragraph V, A of the petition; denies for lack of information the remaining allegations contained in said paragraph.

B. Denies for lack of information the allegations contained in the last sentence of paragraph V, B of the petition; admits the remaining allegations contained in said paragraph.

C. Denies for lack of information the allegations contained in the last sentence of paragraph V, C of the petition; admits the remaining allegations contained in said paragraph.

D to K, inclusive. Denies for lack of informa-



tion the allegations contained in paragraph V, D to K, inclusive, of the petition.

L. Admits that petitioner elected, in his individual income tax returns for the calendar years 1946 and 1947, to return on the installment basis the gains realized from sales of land; denies the remaining allegations contained in paragraph V, L of the petition.

M to R, inclusive. Denies the allegations contained in paragraph V, M to R, inclusive, of the petition.

## VI.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of  
Internal Revenue

Of Counsel:

B. H. Neblett, Division Counsel,  
T. M. Mather, Charles W. Nyquist, Special  
Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed May 14, 1951.

[Title of Tax Court and Cause.]

## STIPULATION OF FACTS

It is hereby stipulated and agreed that:

### I.

The petitioner is an individual, 67 years old (born October 28, 1887), unmarried, a citizen of the United States, and a resident of the City and County of Honolulu, Territory of Hawaii. His home address is 45-503 Kamehameha Highway, Kaneohe, Oahu, Territory of Hawaii. The income tax returns for the years here involved were filed with the (then) Collector of Internal Revenue, District of Hawaii, at Honolulu, Hawaii.

### II.

The notice of deficiency, a copy of which is attached to the petition as Exhibit A, was mailed to the petitioner on March 14, 1951.

### III.

The deficiencies as determined by the Commissioner of Internal Revenue are in income taxes for the calendar years 1946 and 1947 in the amounts of \$10,799.76 and \$1,105.69, respectively, a total of \$11,905.45, of which \$11,721.41 is in dispute. For the calendar year 1946 the taxpayer reported and paid a tax of \$8,284.93 and the Commissioner of Internal Revenue claims a tax of \$19,084.69. For the calendar year 1947 the taxpayer reported and paid a tax of \$1,926.93 and the Commissioner of

Internal Revenue claims a tax of \$3,032.62. Petitioner admits an additional tax for the calendar year 1946 of \$184.04.

#### IV.

On August 17, 1923, petitioner was issued a deed, Land Patent No. 8277 (Exhibit 2), to 11.63 (11.55 net) acres of government land at Halekou-Waikalukai Homesteads, Koolaupoko, Oahu, Territory of Hawaii, pursuant to Special Homestead Agreement No. 1170 (Exhibit 1), in accordance with the provisions of Section 73 of the Hawaiian Organic Act and Sections 352, et seq., of the Revised Laws of Hawaii 1915.

#### V.

In 1915 petitioner erected a dwelling on the said homestead land and has occupied the said dwelling as his home continuously from 1915 to the present time.

#### VI.

From time to time during the period from the date of Special Homestead Agreement No. 1170 (Exhibit 1) until 1946 petitioner leased portions of the said homestead land to various tenants under short term tenancy agreements for farming purposes.

#### VII.

Petitioner was employed full time as a cashier by Metropolitan Meat Market No. 1, Honolulu, from 1914 until his retirement in 1950. During this period and up to the present time, he has never held any other job or had any other employment.

He has never had any office or place of business of his own. He has never owned or held title to any real property other than the above described homestead land.

#### VIII.

In 1946, Samuel W. King, a real estate broker and dealer in land, asked petitioner if petitioner would sell all or any portion of the said homestead land. After several discussions petitioner and Samuel W. King entered into a written agreement dated June 27, 1946, relative to the sale of this land (Exhibit 3). Immediately thereafter Samuel W. King opened an account in his books in the name of petitioner.

#### IX.

Pursuant to the said agreement (Exhibit 3), Samuel W. King prepared a proposed subdivision of the homestead land in accordance with the Revised Ordinances of the City and County of Honolulu 1942 and the Revised Laws of Hawaii 1935. This proposed subdivision, (Exhibit 4), was approved by petitioner and on August 1, 1946, was given Preliminary Approval, and on January 15, 1948, Final Approval, by the City Planning Commission of the City and County of Honolulu as required by law.

#### X.

The applicable ordinances of the City and County of Honolulu and the applicable laws of the Territory of Hawaii provided that a subdivider of rural land need install only necessary streets and water mains, including fire hydrants. Sewers, sidewalks,

and electric and gas utilities were not required by law.

### XI.

In connection with the preparation of the aforesaid plan of subdivision and the construction of the required improvements, and acting under the agreement of June 27, 1946, and with the approval of petitioner, Samuel W. King retained the Paul Low Engineering and Construction Company. On August 24, 1946, this engineering firm submitted an estimate of construction items (Exhibit 5). On October 22, 1946, Samuel W. King and the Paul Low Engineering and Construction Company entered into a written agreement approved by petitioner for the construction of the necessary improvements (Exhibit 6). Costs of the survey, subdivision, construction and file plans, and final staking out were charged and paid for separately (Exhibit 7). The required improvements contracted for were completed and accepted in February, 1947, and the roadway was conveyed to the Territory of Hawaii on December 5, 1949.

### XII.

Payments to the Paul Low Engineering and Construction Company were billed to and made by Samuel W. King in accordance with the terms of the contract between them (Exhibit 6) as follows:

- Payment (a) of \$6,400.00 on November 25, 1946;
- Payment (d) of \$1,600.00 on December 11, 1946;
- Payment (b) of \$6,400.00 on January 14, 1947;
- Payment (c) of \$6,400.00 on January 31, 1947;

Half of payment (c) or \$4,000.00 on December 22, 1947;

The balance of payment (e) or \$4,000.00 on January 14, 1948;

Final payment (f) of \$3,200.00 on January 29, 1948.

The charge for surveying, et cetera (Exhibit 7) was billed to and paid by Samuel W. King as follows:

\$2,700.00 on November 14, 1946; and \$300.00 on February 17, 1947.

All payments were charged to the account of petitioner in the books of Samuel W. King.

### XIII.

In the approved subdivision (Exhibit 4), Lots 16, 32 and 33 were reserved by petitioner and are still unsold. Lot 16 was and is set aside as petitioner's own residential lot and includes the dwelling occupied by petitioner. Lots 32 and 33 were and are reserved for possible future business use. All of the remaining lots were sold as set forth below.

### XIV.

Following the execution of the agreement of June 27, 1946 (Exhibit 3), Samuel W. King had certain forms prepared to be used in connection with the sale of lots in the proposed subdivision, called the Puahuula Subdivision. These forms included a Deposit Receipt and Contract (Exhibit 8), Deed and Mortgage. During the period July 18, 1946 to November 19, 1946, Deposit receipt and

Contract forms were executed by purchasers for all 30 lots offered for sale. Some of these original contracts were modified or cancelled as detailed below.

XV.

The detailed history of the sale of each lot is as follows:

Lot No.	Purchaser	Date of Deposit Receipt and Contract	Date of Deed
1.	Mercado.....	7/26/46	11/25/46
2.	Carvalho.....	8/10/46	11/19/46
3.	Quon.....	8/16/46	11/25/46
4.	Brandt.....	8/17/46	11/25/46
5.)	Cypher, G.....	8/23/46	11/19/46
6.)			
7.	Forde.....	9/10/46	11/19/46
8.	Keane.....	8/17/46	11/19/46
9.	Cazinha.....	8/19/46	11/25/46
10.)	Luke.....	8/13/46	11/19/46
11.)			
12.	Yasuda.....	8/11/46	11/19/46
13.	Ridenour.....	8/17/46	12/ 5/46
14.	Keene.....	8/10/46	11/19/46
15.	Li.....	8/10/46	11/19/46
16.	Reserved as Petitioner's Residence.		
17.	Won, P.....	8/10/46	11/19/46
18.)	Achong, H.....	8/17/46	Cancelled
19.)			11/18/46
18.	Achong, H.....	11/18/46	11/25/46
19.	Halualani.....	11/19/46	11/25/46
20.	Yamane.....	8/17/46	Cancelled
			11/12/46
20.	Halualani.....	11/14/46	11/25/46
21.	Navarro.....	8/27/46	12/10/46
22.	Cypher, C.....	8/27/46	11/25/46
23.	Tobalado.....	9/ 4/46	11/19/46
24.	Munn.....	9/10/46	11/19/46
25.)	Ross.....	8/14/46	Cancelled
26.)			12/28/46
25.	King, P.....	5/ 1/47	5/27/47

Lot No.	Purchaser	Date of Deposit Receipt and Contract	Date of Deed
26.	Tanioka.....	6/ 4/48	4/14/48
27.)	Murabayashi.....	7/18/46	11/19/46
28.)			
29.	Won, J.....	8/26/46	11/19/46
30.)	McPherson.....	7/26/46	11/19/46
31.)			
32.)	Reserved for possible future business use.		
33.)			

## XVI.

The details of the terms of sale of and payments for each lot are as follows:

Lot No.	Price	Total Deposit	Balance
1.	\$4,200	\$1,050	Mtge 11/25/46
2.	3,465	350	Cash 11/ 8/46
3.	3,519	1,850	Cash 11/25/46
4.	3,548	1,000	Mtge 11/25/46
5.)	7,178	1,800	Mtge 11/19/46
6.)			
7.	3,133	783.50	Mtge 11/19/46
8.	3,653	913	Mtge 11/19/46
9.	3,688	370	Cash 1/14/47
10.)	7,458	740	Cash 11/ 7/46
11.)			
12.	3,770	380	Cash 11/19/46
13.	3,800	380	Cash 12/16/46
14.	3,825	3,285	Note 11/19/46
15.	3,855	1,850	Cash 11/ 7/46
16.	Reserved		
17.	3,240	810	Mtge 11/19/46
18.	3,466	866.50	Mtge 11/25/46
19.	4,700	1,175	Mtge 12/11/46
20.	4,740	1,180	Mtge 11/25/46
21.	3,588	897	Mtge 12/10/46
22.	3,620	365	Mtge 11/25/46
23.	3,557	890	Mtge 11/19/46
24.	3,222	795.50	Cash 12/29/46
25.	4,996		Cash 5/ 2/47



Lot No.	Price	Total Deposit	Balance
26.	4,996	1,660	Mtge 6/16/48
27.)	7,590	750	Cash 11/ 4/46
28.)			
29.	3,840	960	Mtge 11/19/46
30.)	7,780	700	Cash 11/13/46
31.)			
32.)	Reserved		
33.)			

XVII.

The details of the purchase money mortgages outstanding during the calendar years 1946 and 1947 are as follows:

Lot No.	Amount of Mortgage	Monthly Payment (Inc. Int.)	— Paid in 1947 —	
			Prin.	Int.
1.	\$3,150	\$50.00	\$ 148.52	\$151.66
4.	2,548	50.00	442.36	107.64
5.)	5,378	60.00	1,278.41	215.61
6.)				
7.	2,349.50	50.00	449.70	110.62
8.	2,740	40.00	321.04	118.96
14.	540 (note)	50.00	540.00	13.09
17.	2,430	50.00	447.87	102.13
18.	2,599.50	50.00	439.96	110.04
19.	3,525	50.00	375.00	115.96
20.	3,560	50.00	375.00	153.60
21.	2,691	50.00	428.69	126.31
22.	3,255	50.00	622.94	67.06
23.	2,667	50.00	764.55	95.35
26.	3,336	50.00	.....	.....
29.	2,880	50.00	374.79	125.21

There were no mortgage payments during the calendar year 1946.

XVIII.

Total costs incurred under the agreement of June 27, 1946 (Exhibit 3) as of December 31, 1946, were as follows:

Construction of improvements: \$32,000.00.

Survey, plans, staking: \$3,000.00.

Legal expense: \$200.00.

Certificate of title: \$30.00.

Blue prints of tract: \$7.85.

Stamp taxes: \$123.00.

Deeds: \$230.00.

Acknowledgments: \$25.00.

Sales commissions: \$10,443.50.

Additional costs thereafter included only sales commissions, cost of papers, revenue stamps, certificates of title, notary fees, legal and accounting fees.

### XIX.

All sales were made by Samuel W. King without any advertising of any kind. No signs were erected on the property. Samuel W. King maintained a real estate office which indicated that he had property of the type herein involved for sale. The lots were sold through the activities of Samuel W. King by either contacting persons whom he believed to be prospective purchasers or by Samuel W. King suggesting to prospective purchasers who contacted him that the lots in question were for sale. Petitioner took no part in negotiating any of the said sales. Purchasers were for the most part relatives or friends living in the Kaneohe area (where the homestead is located). The purchasers of Lots 2, 15, 17, 18, and 29 are related to petitioner by blood or marriage. The purchasers of Lots 8, 14, and 25 are related to Samuel W. King by marriage. All lots were sold on Deposit Receipt

and Contract forms before any subdivision improvements were constructed, but on the representation that improvements would be constructed. Samuel W. King received all payments, processed all papers, and made all disbursements, crediting and debiting petitioner's account in the books of Samuel W. King as appropriate, and rendering periodic statements to petitioner. While none of the proceeds have been actually turned over to petitioner, all proceeds were credited to the account of petitioner and Samuel W. King has invested the net amount thereof for petitioner.

XX.

Petitioner elected, in his individual income tax returns for the calendar years 1946 and 1947, to return on the installment basis the gains realized from sales of his homestead land. In his income tax return for the calendar year 1946, he reported a gain from the sale of his homestead land of \$34,542.80. The Commissioner has determined that the correct amount of gain was \$35,199.48. Petitioner admits that the correct amount of gain for the calendar year 1946 was \$35,199.48.

/s/ SAMUEL P. KING,  
/s/ HERBERT C. DUNN,  
Counsel for Petitioner  
/s/ DANIEL A. TAYLOR,

Counsel for Respondent, Chief Counsel, Internal  
Revenue Service

[Endorsed]: T.C.U.S. Filed July 22, 1954.

[Title of Tax Court and Cause.]

## TRANSCRIPT OF PROCEEDINGS

District Court, Federal Building, Honolulu, T.H.,  
Thursday, July 15, 1954

The above-entitled matter came on for hearing, pursuant to notice to the parties, at 10:10 o'clock a.m.

Before: Honorable C. P. LeMire, J., Presiding.

Appearances: Samuel P. King, Esq., and Herbert G. Dunn, Esq., for the petitioner. E. A. Tonjes, Esq., Donald P. Chehock, Esq., and R. E. Maiden, Jr., Esq. (Hon. Kenneth W. Gemmill, Acting Chief Counsel, Bureau of Internal Revenue), for the Respondent.

The Clerk: The case of Stephen G. Achong, No. 33319.

Mr. King: Samuel P. King, and Herbert G. Dunn, for the petitioner.

Mr. Tonjes: E. A. Tonjes, for the respondent.

The Court: That case is for trial, gentlemen?

Mr. King: Yes, sir.

The Court: How much time do you anticipate?

Mr. King: We were only planning to bring in one witness, Mr. Achong, himself.

The Court: An hour or so?

Mr. King: An hour, maximum, I should say.

The Court: Very well, gentlemen, we will set the case for hearing following the recess and after the calendar call.

(Thereupon, at 10:12 o'clock a.m., the hearing in the above-entitled petition was recessed, to reconvene after the calendar call.)

District Court, Federal Building, Honolulu, T. H.,  
Thursday, July 22, 1954

The above-entitled matter came on for further hearing, pursuant to adjournment, at 9:00 o'clock a.m.

\* \* \* \* \*

The Clerk: The appeal of Stephen G. Achong; Mr. Samuel P. King, Esq., Post Office Box 3556, Honolulu 11, T. H., for the petitioner; and for the Respondent, Mr. E. A. Tonjes.

The Court: Very well, gentlemen, I will be glad to have the parties make a statement of the issues and facts in the case.

Mr. King: We have stipulated upon most of the facts, your Honor, and only one witness to present. Mr. Tonjes has the stipulations.

Mr. Tonjes: Yes, if your Honor please, and I will file it with the Court at this time. These consist of fourteen pages, and quite a few exhibits—eight exhibits.

The Court: What are the numbers of the exhibits?

Mr. Tonjes: Eight, your Honor.

The Court: I want to get the lettering on them. They will be Exhibit A through—

Mr. Tonjes: They are just designated by number, your Honor.

The Court: They are numbered Exhibit 1, 2—

Mr. Tonjes: 1 to 8.

The Court: Very well, the stipulation with the exhibits, 1 through 8, received in evidence.

Mr. King: May I correct my statement?

There is a ninth exhibit, but it is Exhibit A to the notice of deficiency attached to the petition, and it is called Exhibit A.

The Court: Very well, you may proceed with your statement.

Mr. King: Thank you, your Honor.

(Said stipulation and exhibits attached thereto admitted in evidence and made a part of this record.),

#### Opening Statement on Behalf of Petitioner

Mr. King: The issue is a very narrow one, as far as the point of law is concerned, your Honor, and it is: Whether or not certain gain from the sale of real estate property in 1946 and 1947 constituted ordinary gain or capital gain?

Of course, the issue depends upon the facts, and we have stipulated in this stipulation just filed as to most of the facts concerned, concerning how the real property was sold, to whom it was sold, how the land was cut up for the purpose of sale, what the prices of the sales were, when the sales were made, how much the deposit was, whether the balance was paid by mortgage or by cash, and when the payments were made, and so forth, and the only issue left, not stipulated to, to produce the deficiency, we will have testimony about, concerning the character of the land, before he sold it, why

he sold it, and who determined how it was going to be sold.

Maybe Mr. Tonjes has something to add to that.

Mr. Tonjes: I have nothing to add to that, your Honor. I think substantially all of the material facts are in the stipulation.

The Court: I see.

Mr. Tonjes: And the position of the Respondent is that—it is our contention that the lots were not held for sale by the taxpayer in the ordinary course of business and, therefore, constitute ordinary income.

The Court: Very well. You may call your first witness:

STEPHEN G. ACHONG

the petitioner, was called as a witness for and on his own behalf and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you tell us your name?

The Witness: Stephen G. Achong.

Direct Examination

Q. (By Mr. King): Mr. Achong, you are a citizen of the United States? A. Yes.

Q. You are the petitioner in this case?

A. Yes, sir.

Q. Now, we have already stipulated, Mr. Achong, concerning most of the facts of this case.

You did own a homestead?

A. Yes, sir.

Q. In Kaneohe? A. Yes, sir.

(Testimony of Stephen G. Achong.)

Q. And you first acquired that homestead in 1915?      A. 1914.

Q. When you first acquired that homestead, Mr. Achong, what was the land being used for?

A. Agriculture.

Q. Agricultural lands?      A. Yes.

Q. Will you speak up a little more, please, so we can all hear you?

Were there any crops growing on this homestead when you acquired it in 1914?

A. No, it was all wild land.

Q. Did you move on the land shortly after you acquired it?      A. In 1915.

Q. You moved on the land in 1915?

A. Yes, sir.

Q. Did you thereafter plant or have anyone plant any crops on that land?

A. Yes, from then on after 1915, after we had the place cleaned up.

Q. And what crops did you plant on the land, to begin with?

A. Well, papayas, and potatoes, and all that stuff—all small garden stuff.

Q. What was the first crop after you moved on?

A. Sweet potatoes.

Q. What year was that?

A. Along about 1918.

Q. Were there any pineapples planted on that land?

A. Yes, sir; in 1920, I think we started planting pineapples.



(Testimony of Stephen G. Achong.)

Q. To begin with, you say you planted the land to papayas and sweet potatoes, and what else?

A. Cabbage; a garden for my home use—truck garden.

Q. Truck garden?           A. Yes, sir.

Q. Did you, yourself, farm the land or have somebody else farm it for you?

A. I had somebody else.

Q. You hired people to do that?

A. Yes, sir.

Q. Did you lease the land out for farming?

A. At one time.

Q. That was by hired hand?

A. By hired hand.

Q. Did the planting of crops on your land continue from 1915 up until—when?

A. Up into 1930.

Q. What happened in 1930?

A. The land rested.

Q. It was idle?           A. Idle.

Q. You were living on the land at all times; is that right?           A. At all times.

Q. When the land became idle in 1930; how long did it remain idle?

A. It remained idle until about 1940.

Q. You planted nothing on the land?

A. Nothing at all.

Q. Did you lease it at all for any purpose, during that period?           A. No.

Q. You did nothing with it?           A. No.

Q. Just lived on it?           A. Yes.

(Testimony of Stephen G. Achong.)

Q. In 1940, what did you do with the land?

A. Well, I started leasing it out.

Q. For what purpose?

A. To small farmers.

Q. How long did that continue?

A. That continued about five years, I think.

Q. Did that continue up until the time you sold the land?      A. Yes.

Q. 1946?      A. 1946.

Q. And what was planted on the land in the period from 1940 to 1946?

A. Various crops, some potatoes, yams, papayas, cabbage, small garden truck.

Q. During this period from 1940 to 1946, was all of the land planted to agricultural crops, or just a portion of it?

A. Just a portion of it.

Q. Was that the same portion, or did you move around from one portion to another?

A. No, the same portion.

Q. This whole homestead amounted to about eleven and one-half acres?      A. Yes, sir.

Q. During the period of 1940 to 1946, about how much of it was planted in agricultural crops?

A. I would say about eight acres.

Q. What did you do with the balance of the land that was not planted in agricultural crops, during the period of 1940 to 1946?

A. Just let it rest.

Q. You were living on a portion of it?

A. On a portion of it.

(Testimony of Stephen G. Achong.)

The Court: Was that portion he did not rent the part he was living on?

Q. (By Mr. King): Was that portion you were living on—did you rent that? A. No.

Q. To whom did you rent your land during the period of 1940 to 1946?

A. Well, to the Benjamin Parker School, and a Japanese named Yamoshito.

Q. How much of the approximately eight acres was rented to Benjamin Parker School?

A. About four acres.

Q. About four acres to each; is that about right? A. Four acres to each.

Q. The Benjamin Parker School used it for wartime school gardens; is that right?

A. For the cafeteria.

Q. For their own food production?

A. Their own food production.

Q. Were those written leases or—

A. No, just oral.

Q. Just oral, rents on a month-to-month basis?

A. Year-to-year basis.

Q. Now, it is stipulated that, in 1946, you were approached by Samuel Wilder King, a real estate operator, who asked you if you would sell your land, and after several discussions, you entered into a written agreement with Samuel Wilder King, relative to the sale of your land.

A. Yes, sir.

Q. Why did you agree to sell most of your homestead?

(Testimony of Stephen G. Achong.)

A. Well, my friends and relatives came to me and asked me to sell the land.

Q. Speak up a little, please. You will have to speak a little louder, Mr. Achong. The rain is interfering with the sound of your voice.

A. I considered their suggestion and my neighbor, with his homestead, had sold his lots.

Q. You had a neighbor with a homestead like yours?

A. Yes, sir; he had cut his into lots and sold the property.

Q. That was a fellow named Duncan?

A. Duncan, yes.

Q. He had the homestead immediately next to yours?      A. Yes, sir.

Q. And he had already cut his up and sold it?

A. Yes.

Q. In house lots?      A. In house lots.

Q. And you say your relatives had spoken to you about—      A. Relatives and friends.

Q. Asking you to sell your homestead?

A. My homestead.

Q. Was there much farming in the area where your homestead is located in 1946?

A. No, no farming at all.

Q. Had there been farming there in 1914, when you moved out there?

A. Yes; farming all along that section.

Q. Between 1914 and 1946, the character of the land changed, the use of the land changed?

A. The use of the land changed, yes, sir.

(Testimony of Stephen G. Achong.)

Q. As of 1946, it was mostly residential?

A. Turned into residential area, yes.

Q. You did enter into an agreement with Samuel Wilder King, which is Exhibit 3 to the Stipulation, and in accordance with that understanding, he did cut up your land into thirty-three lots?

A. That is right.

Q. Three of those lots were reserved by you; is that right?

A. Yes.

Q. One was your home?

A. One is my home.

Q. You are still living there?

A. Still living there.

Q. And two others fronting on the road for business use, possibly, in the future?

A. That is right.

Q. You still own those three lots?

A. That is right.

Q. The other thirty were sold?

A. Were sold.

Q. Who determined the price at which those other thirty lots were sold?

A. Mr. King.

Q. Subject to your approval?

A. That's right.

Q. Mr. King was an old friend of yours?

A. Yes, he is a friend of mine.

Q. Mr. Achong, it is stipulated that you were born on October 28, 1887; is that correct?

A. Yes, sir.

Q. That makes you a little over 67 years old?

A. 67.

(Testimony of Stephen G. Achong.)

Q. You never married? A. Single.

Q. What education did you have?

A. High school.

Q. You graduated from high school?

A. Yes, sir.

Q. High school of Honolulu?

A. Honolulu.

Q. It has also been stipulated that in 1914 until 1950 you were employed as cashier at the Metropolitan Meat Market No. 1 in Honolulu?

A. Yes, sir.

Q. You retired in 1950?

A. 1950, I retired.

Q. You are not now working any place?

A. Not working.

Q. Between 1914 and 1950, did you have any other employment, except for the argument as to whether you were in the real estate business here, than as cashier for the Metropolitan Meat Market?

A. No.

Q. That is the only job you held?

A. The only job I held.

Q. Do you own any other real property, other than your homestead? A. No, sir.

Q. Have you ever owned any other real property, other than that homestead that you live on, from 1914 to date? A. No, sir.

Q. Have you ever bought or sold any other real property? A. No, sir.

Q. Did you participate, yourself, personally, in making any sales of any of the thirty lots?

(Testimony of Stephen G. Achong.)

A. No, sir.

Q. Samuel Wilder King had an exclusive on that; is that right?      A. Yes.

Q. And it is stipulated in the stipulation the fact that the lots that were sold were all sold on deposit receipt and contract forms, before any subdivision improvements were constructed, but on the representation that the improvements would be constructed; is that correct?

A. That is correct.

Q. In fact, the original purchasers of the thirty lots were all obtained within a matter of two or three months?      A. Yes, sir.

Q. Before any bulldozers or anything else moved on the land to put in the roads?

A. That is right.

Mr. King: That is all.

Cross Examination

Q. (By Mr. Tonjes): Mr. Achong, you testified that you took no active part in the sale of these lots.      A. No, sir.

Q. You didn't take any active part in that?

A. No; I left all that up to Mr. King.

Q. You also testified that some of your friends and relatives asked you to sell the property?

A. Yes, sir.

Q. They had in mind—did they have in mind that you would sell to them more lots suitable for erecting small dwelling houses?

(Testimony of Stephen G. Achong.)

A. That was the idea.

Q. And did some of those people contact you and discuss the matter with you?      A. No.

Q. I thought you said that some of them did speak to you and asked you to sell them a lot; is that right?

A. No, they asked me to sell the whole thing, to sell the homestead.

Q. Sell the homestead?

A. Sell the homestead.

Q. You mean some people contacted you and wanted to buy the entire lot?

A. No, they wanted me to sell it and real estate people do the sub-division.

Q. Now, when someone contacted you, either a friend or relative, they didn't have in mind buying the entire tract, did they?      A. No.

Q. And in order to work out the details, you referred them to Mr. King; is that right?

A. That's right.

Q. But some people did contact you directly, you referred them to King?

A. That is right.

Mr. Tonjes: That is all the questions, your Honor.

The Court: You have no further questions?

Mr. King: That is all your Honor.

The Court: Very well, you may stand aside.

(The witness was excused.)



The Court: Does the petitioner rest?

Mr. King: The petitioner rests.

Mr. Tonjes: The Respondent rests, your Honor.

The Court: Very well, gentlemen. What is your pleasure with regard to the time for filing briefs?

Mr. Tonjes: Whatever suits the Court's convenience, your Honor. Mr. King gets sixty days?

The Court: Simultaneous briefs or alternative briefs?

Mr. King: Alternative briefs, your Honor.

The Court: Very well, you want forty-five or sixty days?

Mr. King: I would like to have sixty days, if I may.

The Court: The petitioner may have until September 22nd for the original brief.

The original brief will be filed on or before September 22nd.

How much time, Mr. Tonjes, for your answering brief?

Mr. Tonjes: I think the usual time is forty-five days, isn't it, your Honor?

The Court: That is for the original brief, and if you desire that length of time——

Mr. Tonjes: I would like forty-five days.

The Clerk: November 8, if your Honor please.

The Court: The Respondent's answering brief will be filed on or before November 8, and thirty days from that date will be December 8.

The Clerk: The petitioner will file his original brief on September 22, the Respondent's reply brief

on November 8, the petitioner's final brief on December 8, 1954.

(Thereupon, at 9:30 o'clock a.m., the hearing in the above-entitled petition was closed.)

[Endorsed]: T.C.U.S. Filed August 30, 1954.

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[Title of Tax Court and Cause.]

## MEMORANDUM FINDINGS OF FACT AND OPINION

Filed March 26, 1956

Samuel P. King, Esq., and Herbert C. Dunn, C.P.A. for the petitioner. E. A. Tonjes, Esq., for the respondent.

This proceeding involves deficiencies in income tax for the years 1946 and 1947 in the respective amounts of \$10,799.76 and \$1,105.69.

The sole question presented is whether the income realized by petitioner from the sale of real property in the taxable years involved is taxable as ordinary income or capital gain.

Nearly all the facts are stipulated and are found accordingly.

### Findings of Fact

Petitioner is a citizen of the United States and a resident of the City of Honolulu, Territory of Hawaii. His returns for the years involved were filed with the collector of internal revenue for the district of Hawaii at Honolulu, Hawaii.

Pursuant to a Special Homestead Agreement dated December 31, 1914, the petitioner was issued a land patent covering 11.55 net acres of Government land at Halekou, Territory of Hawaii.

In 1915 petitioner erected a dwelling on said land and has since occupied the dwelling as his home. From time to time until 1946 petitioner leased under short-term agreements portions of the land to various tenants for farming purposes.

Petitioner was employed as a cashier by Metropolitan Meat Market from 1914 until his retirement in 1950. Petitioner has never owned any other real estate.

In 1946 Samuel W. King, a real estate broker, discussed with petitioner the sale of his homestead property, and on June 27, 1946, a written agreement was entered into between them.

The agreement describes King as "a licensed real estate broker experienced in matters relating to sales of real estate." It provides that the petitioner grant to King the exclusive right, power, and authority to prepare for sale and to sell petitioner's 11.55 acres.

Under the terms of the agreement King was to hire and supervise surveyors and contractors as needed for preliminary planning and for putting the property in condition for sale in accordance with any approved plan of subdivision, the final plan of subdivision to be subject to petitioner's approval. Any plan of improvement was subject to petitioner's approval as to cost.

King was to be reimbursed by petitioner for all

expenses of preparing the property for sale, including without limitation the cost of surveying, mapping, and improving said property, and perfecting title. King was to pay all costs of promotion, advertising, and all other costs necessary for the sale.

King was to keep complete records and books of account which were to be open to petitioner's inspection.

The agreed sales price was to be not less than an average of 25 cents per square foot, the final prices and terms of sale to be agreed upon.

King was to receive 10 per cent commission of the gross sale and 2½ per cent of monthly payments on account of sales on terms other than for cash. Pursuant to said agreement King prepared a plan of proposed subdivision which was approved by petitioner. On August 1, 1946, the City Planning Commission of the City of Honolulu gave preliminary approval and on January 15, 1948, gave final approval to the plan of subdivision.

On October 22, 1946, King, with the approval of petitioner, entered into a contract with the Paul Low Engineering & Construction Company for the construction of the necessary improvements. Costs of the survey, subdivision, construction and file plans, and final staking out were charged and paid for separately.

Between November 25, 1946, and February 17, 1947, the Paul Low Engineering & Construction Company billed to King and was paid the aggregate amount of \$32,000. The charges for surveying, etc.,

paid by King totaled \$3,000. All the payments were charged to the account of petitioner on the books of King.

Petitioner reserved Lots 16, 32, and 33. Lot 16 included the dwelling occupied by petitioner. Lots 32 and 33 were reserved for future business use.

King prepared forms to be used in connection with the sale of lots. These forms included a deposit receipt and contract, deed and mortgage. During the period July 18, 1946, to November 19, 1946, deposit receipt and contract forms were executed by purchasers for the 30 lots offered for sale. King received all payments, processed all papers, and made all disbursements. He made appropriate entries in petitioner's account and rendered periodic statements to petitioner.

All sales were made by King without advertising of any kind. No "For Sale" signs were erected on the property. King maintained a real estate office which indicated he had property of the type here in question for sale. All the lots were sold through the activities of King either by contacting persons whom he believed to be prospective purchasers or by suggesting to persons contacting him that the lots were for sale. On occasion prospective purchasers contacted petitioner, who referred them to King. Petitioner took no part in negotiating any sales.

In his returns for the years 1946 and 1947 petitioner elected to return the gains from the sale of lots on the installment basis. The gain realized in 1946 was \$35,199.48, and in 1947 was \$6,504.39, 50

per cent of which was taken into account as long-term capital gain. The respondent determined that the total gain realized in the respective taxable years was ordinary income.

The lots in question were lands held by petitioner primarily for sale to customers in the ordinary course of his trade or business, and the gain realized from the sales in the taxable years involved is taxable as ordinary income.

### Opinion

LeMire, Judge: The question presented is whether the gain realized each year from the sales of lots is taxable as ordinary income or as capital gain. The respondent determined that the lots constituted property held by the petitioner primarily for sale to customers in the ordinary course of his trade or business. Section 117(a)(1), Internal Revenue Code of 1939. Neither the facts nor the amounts involved are in dispute. The cases in which a similar issue has been litigated are legion. The courts have applied various tests, none of which are regarded as determinative. The issue is one of fact and the question must be viewed in the light of the particular facts of the case under review. *Louisiana Western Lumber Co.*, 22 T.C. 954; *Dunlap vs. Oldham Lumber Co.*, 178 F.2d 781; *Mauldin vs. Commissioner*, 195 F.2d 714.

Petitioner acquired the property, consisting of 11.55 acres, in 1914 under a patent granted by the Territory of Hawaii. A dwelling was erected thereon which petitioner has since occupied as his resi-

dence. Petitioner devoted a portion of the land to raising vegetables, and from time to time rented other portions to tenants for similar purposes. Petitioner never owned other real estate. He was employed full time as a cashier in a market.

Prior to the taxable years the character of the neighborhood changed from a rural to a residential community. Surrounding homestead lands were subdivided and sold for residential lots. The property had appreciated in value and petitioner was urged by relatives and friends to sell. Petitioner chose not to sell the property in the condition in which it was acquired and thus have the benefit of the preferred treatment of capital gains, but to subdivide it and make improvements to reap the benefits of increased selling prices. To accomplish his purpose he entered into a contract with Samuel W. King, a licensed real estate broker experienced in the sale of real property. The substance of such contract is set forth in our findings of fact and need not be here repeated.

The contract with King did not effect a sale of the property. Nor was King an independent contractor since his major activities were subject to the approval of petitioner. The fact that petitioner was otherwise employed and did not give his personal attention to the business is not decisive. One may conduct a business through agents or representatives. The business is none the less his because he permits others to bear the burden of management. *Welch vs. Solomon*, 99 F.2d 41; *Richards vs. Commissioner*, 81 F.2d 369. As King was acting

merely as agent, his activities are to be imputed to petitioner as the principal. *Commissioner vs. Boeing*, 106 F.2d 305, certiorari denied, 308 U.S. 619.

In our opinion this record supports our ultimate finding of fact that the lots in question were held primarily for sale to customers in the ordinary course of a business.

Therefore, we hold that the gain realized from the sale of the lots in the respective taxable years is taxable as ordinary income and not as capital gain. Accordingly,

Decision will be entered for the respondent.

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The Tax Court of the United States  
Washington

Docket No. 33319

STEPHEN G. ACHONG,	Petitioner,
vs.	
COMMISSIONER OF INTERNAL REVENUE,	Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed March 26, 1956, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1946 and 1947 in the respective amounts of \$10,799.76 and \$1,-105.69.

[Seal]            /s/ C. P. LeMIRE,  
Judge

Entered March 27, 1956. Served March 29, 1956.



In the United States Court of Appeals  
for the Ninth Circuit

[Title of Cause No. 33319.]

PETITION FOR REVIEW AND ASSIGNMENT  
OF ERRORS

To the Honorable Judges of the United States  
Court of Appeals for the Ninth Circuit:

1. Petitioner, Stephen G. Achong, of the City of Honolulu, City and County of Honolulu, Territory of Hawaii, represents that on March 27, 1956, the Tax Court of the United States rendered a decision (T. C. Memo. 1956-73, Docket No. 33319) that there are deficiencies in income taxes of your petitioner in the amount of \$10,799.76 for the year 1946 and of \$1,105.69 for the year 1947, and petitioner asks a review of said decision by this Court.

2. Petitioner is a citizen of the United States and a resident of the city of Honolulu, City and County of Honolulu, Territory of Hawaii, and his returns for federal income tax purposes for the taxable years 1946 and 1947 were made to the collector of internal revenue for the District of Hawaii whose office is located in Honolulu, Territory of Hawaii, which is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

3. The nature of the controversy involves the question of whether the gain realized from the sale of Petitioner's homestead land was ordinary income or a capital gain.

4. Petitioner assigns as errors committed by the Tax Court of the United States in its decision aforesaid the following:

(1) The court erred in holding that the land in question was held by Petitioner primarily for sale to customers in the ordinary course of his trade or business, and in failing to hold instead that the land was a capital asset.

(2) The court erred in holding that the gains realized by the Petitioner from the sale of his homestead during the taxable years 1946 and 1947 were ordinary income, and in failing to hold instead that the gains were long-term capital gains.

(3) The court erred in holding that there are deficiencies of \$10,799.76 and \$1,105.69, respectively, in the Petitioner's returns of income taxes for the calendar years 1946 and 1947, and in failing to determine instead, that there is a deficiency of \$184.04 in the Petitioner's return of income tax for the calendar year 1946 and that Petitioner's original return of income tax for the calendar year 1947 was correct.

Wherefore, your Petitioner prays that this Court review the aforementioned decision of the Tax Court of the United States pursuant to the statute in such case made and provided and the rules of this court.

Dated at Honolulu, Hawaii, this 22nd day of June, 1956.

/s/ SAMUEL P. KING,

Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed June 26, 1956.

In the United States Court of Appeals  
for the Ninth Circuit

[Title of Cause No. 33319.]

NOTICE OF FILING PETITION FOR  
REVIEW

To: Commissioner of Internal Revenue, Washing-  
ton, D. C.:

You are hereby notified that Stephen G. Achong, on June 26, 1956, filed with the clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of said Tax Court rendered on March 27, 1956, in the case entitled Stephen G. Achong, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 33319. Attached hereto is a copy of said petition for review and assignment of errors.

Dated at Honolulu, Hawaii, this 26th day of June, 1956.

/s/ SAMUEL P. KING,  
Attorney for Petitioner

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed June 26, 1956.

The Tax Court of the United States  
Washington

[Title of Cause No. 33319.]

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 10, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Appeal and Praecipe for Record", including Joint exhibits 1 through 8 attached to the Stipulation of Facts, in the proceeding before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 13th day of July, 1956.

[Seal]            /s/ RALPH A. STARNES,  
Chief Deputy Clerk, Tax Court  
of the United States

[Endorsed]: No. 15229. United States Court of Appeals for the Ninth Circuit. Stephen G. Achong, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: August 6, 1956.

Docketed: August 15, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 15229

STEPHEN G. ACHONG,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

STATEMENT OF POINTS INTENDED TO BE  
RELIED UPON ON APPEAL

Comes now Stephen G. Achong, Petitioner-Appellant, by Samuel P. King, his attorney, and submits the following as his statement of the points on which he intends to rely on this appeal:

1. The court erred in holding that the land in question was held by Petitioner-Appellant pri-

marily for sale to customers in the ordinary course of his trade or business, and in failing to hold instead that the land was a capital asset.

2. The court erred in holding that the gains realized by the Petitioner-Appellant from the sale of his homestead during the taxable years 1946 and 1947 were ordinary income, and in failing to hold instead that the gains were long-term capital gains.

3. The court erred in holding that there are deficiencies of \$10,799.76 and \$1,105.69, respectively, in the Petitioner-Appellant's returns of income taxes for the calendar years 1946 and 1947, and in failing to determine instead that there is a deficiency of \$184.04 in the Petitioner-Appellant's return of income tax for the calendar year 1946 and that Petitioner-Appellant's original return of income tax for the calendar year 1947 was correct.

Dated at Honolulu, Hawaii, this 23rd day of October, 1956.

/s/ SAMUEL P. KING,

Attorney for Petitioner-Appellant

Certificate of Service attached.

[Endorsed]: Filed October 27, 1956. Paul P. O'Brien, Clerk.